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In the Supreme Court of the United States

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

W. V. GRIFFIN AND H. W. PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD

STATEMENT AS TO JURISDICTION ON APPEAL

In compliance with Rule 12 of the Rules of the Supreme Court, appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the above-entitled case on appeal.

STATUTES

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. III, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (4); U. S. Code, Tit. 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219, U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

DECREE

The decree sought to be reviewed was entered February 22, 1937.

The petition for appeal was filed and the order allowing the appeal was entered April 16, 1937.

THE NATURE OF THE CASE AND RULINGS BELOW

This suit was brought under Urgent Deficiencies Act (38 Stat. 219; U. S. Code, Title 28, Secs. 45 and 47a) by the receivers of the Georgia & Florida Railroad, petitioners below, to enjoin, set aside, and annul an order of the Interstate Commerce Commission issued February 4, 1936, in a proceeding on further hearing before the Commission entitled Docket 9200, *Railway Mail Pay—In the Matter of the Application of the Georgia & Florida Railroad for Increased Rates of Pay,* 214 I. C. C. 66. The order established "fair and reasonable rates" to be received by the petitioners for services rendered on and after April 1, 1931, for the transportation of United States mail. Effective August 1, 1928, the Commission, in *Railway Mail Pay,* 144 I. C. C. 675, established rates for transportation of mail by railroads over 100 miles in length, including the Georgia & Florida Railroad. On April 1, 1931, the receivers of that railroad filed an application with the Commission for an increase in the rates alleging that they were not fair and reasonable as to that railroad. After hearing, the Commission issued a report and order on May 10, 1933, finding that the rates established August 1, 1928, were fair and reasonable and establishing them as the rates to be received by petitioners on and after April 1, 1931. Petitioners brought suit to enjoin and annul the order of May 10, 1933, and on January 18, 1935, the court rendered its opinion holding in substance that the established rates were less

than the cost of the service, and entered its decree enjoining and annulling the order and directing that the Commission take further action. Further hearing was held by the Commission, and on February 4, 1936, it issued a further report and order again finding that the existing rates were fair and reasonable and establishing them to be received by petitioners on and after April 1, 1931. By supplemental bill of complaint petitioners sued to enjoin the order of February 4, 1936, and on February 22, 1937, the court rendered its opinion holding again that the rates established by the Commission were less than fair and reasonable rates to petitioners and entered its decree setting aside and annulling the order and again directing further action by the Commission. The court ruled, in substance, that the rates established by the Commission were insufficient to produce a proper return; that in determining the fair and reasonable rates the Commission was without authority to make comparisons of the returns produced by the established mail pay rates with returns received by petitioners from other services in passenger train cars or with returns produced by freight rates or any other such comparisons. The court's conclusion that the rates are inadequate seems to rest entirely upon a so-called "cost study" or estimate of the cost of the service, although the court itself stated that the study was "hypothetical" and not necessarily conclusive.

The questions presented are substantial. This is the first suit brought under Urgent Deficiencies

Act to enjoin and annul an order of the Commission establishing rates and compensation for transportation of mail. There are numerous railroads situated similar to the petitioners in this case and a decision by this Court will be of particular importance in the future, and will also be helpful to the Commission in the future establishment of railway mail pay rates in that it will serve to guide the Commission with respect to matters of evidence which should or should not be considered in such proceedings. Appended hereto are copies of the three-judge court's opinions of January 18, 1935, and February 22, 1937.

CASES SUSTAINING JURISDICTION

United States v. *Erie Railroad Co.*, 280 U. S. 98.

United States v. *Baltimore & Ohio R. R. Co.*, 284 U. S. 195.

I. C. C. v. *Oregon-Washington R. Co.*, 288 U. S. 14.

United States v. *Northern Pacific Ry.*, 288 U. S. 490.

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In the District Court of the United States for the Augusta Division of the Southern District of Georgia

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In Equity. No. 207

W. V. GRIFFIN AND H. W. PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD, PETITIONERS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

This is a suit by W. V. Griffin and H. W. Purvis, Receivers of the Georgia & Florida Railroad, against the United States of America and the Interstate Commerce Commission to enjoin, set aside, amend, and suspend an order of such Commission of May 10, 1933, denying an application for increased compensation for the transportation of mail. The suit is brought under U. S. C. A., Title 28, Sections 41 (27 and 28) and 43–48.

No other facts were established or sought to be established than those set forth in such order of said Commission, a copy of which is annexed to petitioners' complaint, and it is therefore considered unnecessary and redundant to restate "Findings of Fact" as provided by Equity Rule 70½. The challenge is to the conclusion drawn from undisputed facts.

The facts developed in the "cost study" fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission. All parties to this controversy agree that a "cost study" is not and cannot be mathematically correct but is an approximation. Such "cost study" discloses among other facts that "There was (1) a deficit in net railway operating income from mail of $4,945.00 based upon 1931 operations." It further disclosed that as regards revenue: "The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79" or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents.

The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads and that therefore it should be in accord with other railroads of such Class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing.

While it is true that "For the purpose of determining and fixing rates or compensation hereunder the Commission is authorized to make such classi-

fication of carriers as may be just and reasonable and * * * fix general rates applicable to all carriers in the same classification", it can fix such rates only "Where just and equitable." 39 U. S. C. A., Section 549.

The transportation of mail by railroads is compulsory but they are "entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." 39 U. S. C. A., Section 541.

There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance. The bald fact remains that this railroad is required in order to escape severe punishment (39 U. S. C. A., Section 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of service. This compensation is not in compliance with the duty on the United States to pay "fair and reasonable compensation" and is not "just and equitable."

IT IS THEREFORE ORDERED AND DECREED:

(1) That said order of the Interstate Commerce Commission of May 10, 1933, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933.

Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what percent of return on the investment, if any, would be required to make the compensation fair and reasonable.

This 18th day of January 1935.

SAMUEL H. SIBLEY,
United States Circuit Judge.
WM. H. BARRETT,
United States District Judge.
MERVIN UNDERWOOD,
United States District Judge.

In the District Court of the United States for the Southern District of Georgia, Augusta Division

In Equity. No. 228

H. V. GRIFFIN AND H. W. PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Effective August 1, 1928, the Interstate Commerce Commission (hereinafter called Commission), in *Railway Mail Pay,* 144 I. C. C. 675, established rates for transportation of mail by railroads over 100 miles in length and these rates were applied to the Georgia & Florida Railroad. Thereafter, the receivers of such railroad made application to the Commission for an alteration of such rates so that they would be fair and reasonable for such railroad. After a test period, investigation, and hearing from counsel for applicant and for the Postmaster General the Commission on May 10, 1933, declined to change the rates.

The receivers of such railroad then brought their petition before a Three-Judge Court against the United States of America and against said Com-

mission, praying that said order of May 10, 1933, be declared unlawful and wholly void and that such Commission reopen and reconsider the proceedings and "determine the fair and reasonable rates to be received by petitioners for transportation of the mails, on and after said April 1, 1931."

"No other facts were established or sought to be established than those set forth in said order of said Commission, a copy of which is annexed to petitioners' complaint." "The challenge is to the conclusion drawn from the undisputed facts." (Previous decision of this court.) The court therefore deemed it unnecessary to state "Findings of Fact", but its judgment did declare certain facts as follows:

> (1) The facts developed in the "cost study" fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission.
>
> (2) All parties to this controversy agree that a "cost study" is not and cannot be mathematically correct but is an approximation.
>
> (3) "The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79" or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents.
>
> (4) The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under

similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class I railroads and that therefore it should be in accord with other railroads of such class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing. The Commission can fix such rates only "Where just and equitable."

(5) The transportation of mail by railroads is compulsory but they are "entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith."

(6) There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance.

The said order was annulled and the Commission was directed to take such further action as the law requires. There was no appeal from this decision.

Thereafter the Commission of its own motion reopened such proceeding, which resulted in a report on February 4, 1936, again establishing the same rates which this court had declared unlawful.

It becomes important to ascertain what, if any, additional testimony or what, if any, different rules of law warranted such conclusion.

For the reason that neither report states definitely "Findings of Fact" as such it is not easy to ascertain what different facts existed at the dif-

ferent hearings. We will do our best to ascertain the differences in facts and in rules of law following the course of discussion in the last report.

The report, after quoting from brief of applicant, states:

> There is implicit in the statement quoted, and in the corresponding portion of the opinion referred to, the assumption that if the department discontinues mail service on applicant's trains the applicant will thereby be saved the expenditure of $1.0279 for every dollar of revenue it thus loses.

We do not concur in this statement. The opinion definitely states that these figures were derived by "the distribution of expense upon the space ratios" and by the employment of methods approved or directed by the Commission. However we deem this difference in interpretation immaterial.

The argument of the Commission to destroy the effect of its methods previously used is thus stated:

> * * * Relative costs derived from a series of studies of expenditures for operations common to a number of services cannot be converted into absolute costs by using a single-figure relation derived from such studies.
>
> The cost computed in the manner described is a hypothetical cost and not an actual cost, and is not necessarily conclusive as applicant contends. In other mail-pay proceedings, in which space authorized and paid

for was found to be the space that should be charged to mail in cost studies similar to that here, consideration was given to other factors as well, such as the amount and character of the unused space reported as operated (Railway Mail Pay, 85 I. C. C., 157, 170, 123 I. C. C. 33, 39); the actual space occupied by mail, as distinguished from authorized space, determined by the mail load carried, based upon a count of bags and of packages outside of bags, and, in some instances, by the weight (Railway Mail Pay, 95 I. C. C. 493, 500, 511, 120 I. C. C. 439, 446); comparisons with compensation received from other services in passenger-train cars (Railway Mail Pay, 144 I. C. C. 675, 706); comparisons with freight rates (Railway Mail Pay, 144 I. C. C. 675, 705, 151 I. C. C. 734, 742); comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole (Railway Mail Pay, 144 I. C. C. 675, 699); and the character of the service performed in connection with transporting the mail (Railway Mail Pay, 56 I. C. C. 1, 8, Electric Railway Mail Pay, 58 I. C. C. 455, 464, 98 I. C. C. 737, 755).

Neither applicant nor this Court entertains the view that the hypothetical cost is "necessarily conclusive." It is merely the fairest method that has been devised. If "actual cost" as to each item be required applicants would be helpless and the Com-

mission would be reduced to guessing. What elements may have been persuasive "In other mail proceedings" are not necessarily to be considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element. Further, there is no testimony here as to "unused space reported as operated." There is included payment for unused space not operated, of which more later. There is nothing to justify disregard of the fact used in the first report that "space authorized for mail is regarded as space used."

The law as established in this case by the previous decision, unreversed, makes inapplicable "comparisons with compensation received from other services in passenger train cars"; "comparisons with freight rates"; and "comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole."

There is no criticism of "the character of the service performed in connection with transporting the mail."

Further argument of the Commission, as we understand it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the post office department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed.

There is, however, this further finding of fact implied, though not definitely stated, viz: that an unnecessarily large car is used and this adds to the portion paid by the mail for unused space and that if 15 feet were eliminated from the car the mail space ratio would be reduced to 10.79 per cent, resulting in a profit to applicant from mail of $1,711.

Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed "to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively", but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned "in accordance with the formulas prescribed for Class 1 roads for the separation of expenses between freight and passenger services."

The second report not only does not contradict this but reaffirms it in this language: "The methods are the same as those prescribed in our rules governing separation of such expenses on large steam railroads."

We find nothing that warrants any change in our conclusions as to the legality of the order now before us from our previous conclusion as to the same

rates except the fact, stated by implication, that the use of a mixed car shorter by 15 feet would result in a profit from mail revenue of $1,711 annually. The report discloses "The total mail service investment thus derived was $457.082." This return is approximately 0.0037 per cent. This is not "fair and reasonable."

Inasmuch as all the facts constituting the basis for the order of the Commission are fully set out in the report it is deemed unnecessary to restate them in this opinion as findings of fact.

IT IS THEREFORE ORDERED AND DECREED:

(1) That said order of the Interstate Commerce Commission of February 4, 1936, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of February 4, 1936.

This 22nd day of February 1937.

SAMUEL H. SIBLEY,
United States Circuit Judge.
WM. H. BARRETT,
United States District Judge.
E. MARVIN UNDERWOOD,
United States District Judge.

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